

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 17, 2021

Christopher M. Wolpert
Clerk of Court

ERNESTO RAY LOYA,

Petitioner - Appellant,

v.

RICK WHITTEN, Warden,

Respondent - Appellee.

No. 21-6102
(D.C. No. 5:20-CV-00922-C)
(W.D. Okla.)

ORDER

Before **BACHARACH** and **PHILLIPS**, Circuit Judges.

This matter is before us following the opening of this appeal. Appellant Ernesto Ray Loya seeks to appeal the district court's denial of his 28 U.S.C. § 2254 habeas application. However, Appellant must first obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1). The district court did not address whether a COA should issue and Appellant has not requested a COA from the district court.

In light of this court's decision in *United States v. Higley*, No. 17-1111 (10th Cir. Sep. 29, 2017) (unpublished) (stating that the district court must ordinarily decide, in the first instance, whether to issue a COA), we direct a limited remand to the district court to consider whether to issue a COA for this appeal.

Pending a decision by the district court, this appeal is abated. Within 5 days after the district court issues its decision, the clerk of the district court is directed to supplement the preliminary record.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk



By: Candice Manyak
Counsel to the Clerk